

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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LOUIS VIGNOLA, individually;  
TAMARA HARLESS, as Special  
Administrator for the Estate of NANCY  
MARIE OUELLET; LOUIS VIGNOLA as  
Guardian ad Litem for CAROLYN  
VIGNOLA, a minor; and LOUIS  
VIGNOLA as Guardian ad Litem for  
GABRIEL VIGNOLA, a minor,

Plaintiffs,

v.

CHARLES ALFRED GILMAN, JR.;  
AUTO-OWNERS INSURANCE  
COMPANY; MUTUAL OF ENUMCLAW  
INSURANCE COMPANY; DOES I-X  
AND ROE CORPORATIONS XI-XX,  
inclusive,

Defendants.

2:10-CV-02099-PMP-GWF

ORDER

Presently before the Court is Defendant Auto-Owners Insurance Company's Motion to Determine Applicable Law (Doc. #61), filed on January 3, 2012. Plaintiffs did not file a timely opposition. On January 30, 2012, the Court granted Defendant's Motion (Doc. #64), thereby applying Colorado law to Plaintiffs' claims.

On February 8, 2012, Plaintiffs filed a Motion for Reconsideration (Doc. #67) of the Court's Order on the Motion to Determine Applicable Law. On February 27, 2012, Defendant filed an Opposition (Doc. #72). On March 7, 2012, Plaintiffs filed a Reply (Doc. #78). On March 14, 2012, the Court granted Plaintiffs' Motion for Reconsideration (Doc. #81). Plaintiffs then filed an Opposition (Doc. #86) to Defendant's Motion to Determine

1 Applicable Law on March 28, 2012. On April 6, 2012, Defendant filed a Reply (Doc. #88).

2 **I. BACKGROUND**

3 On or about May 24, 2010, Nancy Marie Ouellet (“Ouellet”) applied for,  
4 negotiated, and purchased a motorcycle insurance policy from Defendant Auto-Owners  
5 Insurance Company (“Auto-Owners”), a Michigan corporation with its principal place of  
6 business in Michigan, which is licensed to do business in Colorado. (Def.’s Mot. to  
7 Determine Applicable Law (“Mot. to Det.”) (Doc. #61), Ex. A ¶ 2-4, Ex. A-1.) Auto-  
8 Owners is not licensed to do business in Nevada, nor does Auto-Owners underwrite  
9 insurance in Nevada. (Mot. to Det., Ex. A ¶ 4.) Ouellet purchased the insurance policy  
10 through an independent insurance agency, Don Bates Insurance, located in Colorado. (Id. ¶  
11 2, 5, Ex. A-1.) At the time she obtained the policy, Ouellet resided in Colorado. (Mot. to  
12 Det., Ex. A ¶ 5, Ex. A-1.) The policy was negotiated, purchased, executed, and issued in  
13 Colorado. (Mot. to Det., Ex. A ¶ 6.) The policy provided under-insured motorist benefits  
14 of \$500,000 per person/per occurrence. (Mot. to Det., Ex. A-2.) Ouellet’s motorcycle was  
15 licensed in Colorado. (Mot. to Det., Ex. A-3.)

16 On June 22, 2010, Ouellet was traveling on US 93 in Nevada when Defendant  
17 Charles Gilman’s (“Gilman”) automobile struck her motorcycle. (Id.) Ouellet resided in  
18 Colorado at the time of the accident, and none of the Plaintiffs ever resided in Nevada.  
19 (Mot. to Det., Ex. A ¶ 14, Ex. A-3.) As a result of the accident, Ouellet suffered serious  
20 injuries and died. (Mot. to Det., Ex. A-3.) Don Bates Insurance filed an Automobile Loss  
21 Notice with Auto-Owners on Ouellet’s behalf on July 7, 2010. (Mot. to Det., Ex. A-4.)  
22 The Notice listed Plaintiff Louis Vignola (“Vignola”) as the policy “Contact” at a Colorado  
23 address. (Id.) From July 7, 2010 to August 19, 2010, Auto-Owners’s Colorado office  
24 communicated with Vignola regarding the claim. (Mot. to Det., Ex. A ¶¶ 11-13; Pls.’  
25 Opp’n to Mot. to Det. (“Opp’n”) (Doc. #86), Exs. 5-7.) Vignola and Ouellet’s two children  
26 (collectively “Plaintiffs”) hired counsel in Nevada, and on August 9, 2010, Plaintiffs’

1 counsel instructed Auto-Owners to direct all communications to Plaintiffs' counsel in Las  
2 Vegas, Nevada. (Opp'n, Exs. 5-6.)

3 Plaintiffs filed a Complaint in the Eighth Judicial District Court of Clark County,  
4 Nevada on November 2, 2010. (Notice of Removal (Doc. #1), Ex. A.) Plaintiffs alleges  
5 that Auto-Owners refused to settle Plaintiffs' claims and failed to reasonably and promptly  
6 evaluate their claims. (Id. ¶¶ 18-19.) Plaintiffs brought suit against Auto-Owners for bad  
7 faith, unfair claims practices in violation of Nevada Revised Statutes § 686A.310, and  
8 contractual claims. (Opp'n at 3.) Auto-Owners removed the case to this Court on  
9 December 2, 2010. (Notice of Removal.)

10 Auto-Owners now seeks a determination of which state's law, Nevada or  
11 Colorado, applies to Plaintiffs' claims against Auto-Owners in this action. Auto-Owners  
12 identifies three conflicts of law between Nevada and Colorado. First, unlike in Nevada,  
13 there is no private right of action for violation of the Unfair Claims Practices Act in  
14 Colorado. Second, unlike in Nevada, in Colorado the insured must seek to recover first  
15 from the under-insured tortfeasor before the insured can bring suit against the insurer.  
16 Third, unlike in Nevada, Colorado law provides a statutory cap on non-economic damages  
17 in bad faith actions. Auto-Owners contends that the substantial relationship test applies to  
18 Plaintiffs' claims against Auto-Owners, and because Colorado has a substantial relationship  
19 to the claims against Auto-Owners, Colorado law should apply.

20 Plaintiffs respond that their bad faith and unfair claims practices claims are torts,  
21 and because these torts arise out of the accident that occurred in Nevada, the most  
22 significant relationship test from § 146 of the Second Restatement on Conflicts of Law  
23 applies. The general rule under § 146 is that the law of the state where the injury occurred  
24 applies unless another state has a more significant relationship to the claims. Plaintiffs  
25 argue Nevada is the place of injury and Colorado does not have a more significant  
26 relationship to the claims. Therefore, Plaintiffs argue, Nevada law should apply to

1 Plaintiffs' claims of bad faith and unfair claims practices. But Plaintiffs distinguish  
 2 between their bad faith and unfair claims practices claims and their contractual claims.  
 3 Although Plaintiffs do not articulate the nature of their contractual claims, Plaintiffs  
 4 concede that Colorado law would apply to Plaintiffs' contractual claims.

5 Auto-Owners reply that all of Plaintiffs' claims against Auto-Owners are  
 6 contractual because they relate to Auto-Owners' alleged refusal to pay insurance benefits  
 7 under the insurance contract and not to the causation of the accident. Additionally, Auto-  
 8 Owners acknowledges that a bad faith refusal to pay insurance benefits can be considered a  
 9 tort and thus the most significant relationship test would apply. But Auto-Owners  
 10 concludes that even under the most significant relationship test, Colorado law applies.

## 11 **II. DISCUSSION**

12 Federal courts sitting in diversity apply the forum state's choice of law rules to  
 13 determine applicable substantive law. Narayan v. EGL, Inc., 616 F.3d 895, 898 (9th Cir.  
 14 2010). In Nevada, the most significant relationship test, as set forth in § 145 of the Second  
 15 Restatement of Conflicts of Law, governs tort actions. Section 145 provides:

16 (1) The rights and liabilities of the parties with respect to an issue in  
 17 tort are determined by the local law of the state which, with respect to  
 18 that issue, has the most significant relationship to the occurrence and  
 19 the parties under the principles stated in § 6.

20 (2) Contacts to be taken into account in applying the principles of § 6  
 21 to determine the law applicable to an issue include:

- 22 (a) the place where the injury occurred,
- 23 (b) the place where the conduct causing the injury occurred,
- 24 (c) the domicil, residence, nationality, place of incorporation and  
 25 place of business of the parties, and
- 26 (d) the place where the relationship, if any, between the parties is  
 centered.

These contacts are to be evaluated according to their relative  
 importance with respect to the particular issue.

24 Section 145 applies to tort actions "unless another, more specific section of the  
 25 Second Restatement applies to the particular tort." Gen. Motors Corp. v. Eighth Judicial  
 26 Dist. Court of State of Nev. ex rel. Cnty. of Clark, 134 P.3d 111, 116 (Nev. 2006). The

1 Second Restatement specifically addresses personal injury actions, and thus the most  
 2 significant relationship test, as set forth in § 146, applies to personal injury actions. Section  
 3 146 of the Second Restatement states:

4 In an action for personal injury, the local law of the state where the  
 5 injury occurred determines the rights and liabilities of the parties,  
 6 unless, with respect to the particular issue, some other state has a more  
 7 significant relationship under the principles stated in § 6 to the  
 8 occurrence and the parties, in which event the local law of the other  
 9 state will be applied.

8 The Second Restatement defines “personal injury” as “either physical harm or mental  
 9 disturbance, such as fright and shock, resulting from physical harm or from threatened  
 10 physical harm or other injury to oneself or to another.” Restatement Second of Conflicts of  
 11 Law § 146 cmt. b. Both § 145 and § 146 incorporate the following principles from § 6:

- 12 (a) the needs of the interstate and international systems,
- 13 (b) the relevant policies of the forum,
- 14 (c) the relevant policies of other interested states and the relative  
 interests of those states in the determination of the particular issue,
- 15 (d) the protection of justified expectations,
- 16 (e) the basic policies underlying the particular field of law,
- 17 (f) certainty, predictability and uniformity of result, and
- 18 (g) ease in the determination and application of the law to be applied.

17 By contrast, the substantial relationship test governs contract claims in Nevada.

18 Consol. Generator-Nevada, Inc. v. Cummins Engine Co., 971 P.2d 1251, 1253 (Nev. 1998).

19 The Court should consider the following factors in determining which state has a substantial  
 20 relationship to the contract:

- 21 (a) the place of contracting,
- 22 (b) the place of negotiation of the contract,
- 23 (c) the place of performance,
- 24 (d) the location of the subject matter of the contract, and
- 25 (e) the domicile, residence, nationality, place of incorporation and  
 place of business of the parties.

25 971 P.2d at 1253-54 (citations omitted).

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1 Here, Plaintiffs bring suit against Auto-Owners for bad faith, unfair claims  
2 practices in violation of Nevada Revised Statutes § 686A.310, and contractual claims. The  
3 parties agree that the substantial relationship test applies to Plaintiffs' contractual claims,  
4 and under that test, Colorado law applies. But the parties disagree over which test applies  
5 to Plaintiffs' claims for bad faith and unfair claims practices: (1) the most significant  
6 relationship test under § 146, (2) the most significant relationship test under § 145, or (3)  
7 the substantial relationship test. This determination turns on whether Plaintiffs' claims for  
8 bad faith and unfair claims practices are tort or contract claims.

9 The most significant relationship test from § 146 does not apply because neither  
10 claim is a personal injury tort. Specifically, Plaintiffs' claims for bad faith and unfair  
11 claims practices are not claims of "physical harm or mental disturbance, such as fright and  
12 shock, resulting from physical harm or from threatened physical harm or other injury to  
13 oneself or to another." Restatement Second of Conflicts of Law § 146 cmt. b. However,  
14 the most significant relationship test from § 145 applies to Plaintiffs' bad faith claim  
15 because Nevada recognizes a cause of action in tort for bad faith refusal to pay insurance  
16 benefits. See U.S. Fid. & Guar. Co. v. Peterson, 540 P.2d 1070, 1071 (Nev. 1975). But it is  
17 unclear whether under Nevada law Plaintiffs' claim of unfair claims practices is a tort or  
18 contract claim. Therefore, the Court will apply both the most significant relationship test  
19 from § 145 and the substantial relationship test to Plaintiffs' claims against Auto-Owners.

20 Section 145 instructs the Court to consider the contacts listed in § 145(2) in  
21 evaluating the § 6 principles. Although Nevada is the place of the personal injury upon  
22 which Plaintiffs' claims against Auto-Owners are based, the injury for which Plaintiffs seek  
23 relief against Auto-Owners is the alleged mis-handling of Plaintiffs' injury claim. Despite  
24 the fact that Plaintiffs' counsel is based in Nevada, Auto-Owners' Colorado office handled  
25 Plaintiffs' claim, thus the conduct and the injury occurred in Colorado. See Restatement  
26 Second of Conflicts of Law § 145(2)(a)-(b). Ouellet resided in Colorado, Vignola resides in

1 Colorado, and Auto-Owners is licensed to do business in Colorado. See id. § 145(2)(c).  
2 Lastly, the parties' relationship is centered in Colorado because Ouellet applied for,  
3 negotiated, and entered into the insurance contract in Colorado; Ouellet's motorcycle was  
4 licensed in Colorado; Ouellet's insurance agent, Don Bates, is located in Colorado; and  
5 Auto-Owners's Colorado office handled Plaintiffs' claim. See id. § 145(2)(d). The fact  
6 that Plaintiffs' counsel communicated with Auto-Owners's Colorado office from Nevada,  
7 does not alter this conclusion. In short, all four of the contacts listed in § 145(2) suggest  
8 that Colorado has the most significant relationship to Plaintiffs' claims against Auto-  
9 Owners.

10         These contacts inform the § 6 analysis. First, given the volume of contacts with  
11 Colorado, the needs of the interstate and international systems are best satisfied by applying  
12 Colorado law. Second, although Nevada, as the forum state, has an interest in resolving  
13 disputes over an accident that occurred in Nevada, the injury at issue here is not Ouellet's  
14 death, it is the alleged mis-handling of Plaintiffs' insurance claim, which occurred in  
15 Colorado. Thus, Nevada's interests in the claims against Auto-Owners are minimal. Third,  
16 Colorado has significant interests in resolving the claims for bad faith and unfair claims  
17 practices—which occurred in Colorado, between residents of Colorado and a company  
18 licensed to do business in Colorado and arose out of a contract executed in Colorado.  
19 Fourth, having negotiated and executed the insurance contract in Colorado, the parties may  
20 have justifiably expected that Colorado law would govern disputes relating to the contract.  
21 Fifth, although Nevada law is arguably more favorable to the insured, both bodies of law  
22 impose duties and provide protections for parties to an insurance contract. Sixth, applying  
23 Colorado law to a contract executed in Colorado enhances certainty, predictability, and  
24 uniformity of result for the contracting parties. Seventh, there is no significant difference in  
25 the ease of determination and application of Nevada and Colorado law to Plaintiffs' claims.  
26 Therefore, Colorado law applies to Plaintiffs' claims of bad faith and unfair claims practices

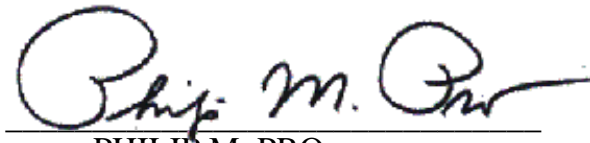
1 under the most significant relationship test as set forth in § 145.

2 Similarly, Colorado law applies to Plaintiffs' claims against Auto-Owners under  
3 the substantial relationship test. Ouellet and Auto-Owners entered into the contract for  
4 motorcycle insurance in Colorado. Don Bates Insurance negotiated the contract with Auto-  
5 Owners on Ouellet's behalf in Colorado. The insurance policy was issued in Colorado  
6 while Ouellet resided in Colorado; thus, the contract was performed in Colorado. The  
7 subject matter of the contract was Ouellet's motorcycle, which was licensed in Colorado.  
8 Finally, Ouellet resided in Colorado and Auto-Owners was licensed to do business in  
9 Colorado. Although Plaintiffs argue that Nevada law should apply because Plaintiffs  
10 brought suit in Nevada and hired a Nevada attorney, the state where Plaintiffs brought suit  
11 and the location of Plaintiffs' counsel are not factors in the substantial relationship test.  
12 Accordingly, the Court will apply Colorado law to Plaintiffs' bad faith, unfair claims  
13 practices, and contractual claims against Auto-Owners.

14 **III. CONCLUSION**

15 IT IS THEREFORE ORDERED that Defendant Auto-Owners Insurance  
16 Company's Motion to Determine Applicable Law (Doc. #61) is hereby GRANTED.

17  
18 DATED: April 13, 2012

19   
20 PHILIP M. PRO  
21 United States District Judge  
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